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No. 08-67

In the
Supreme Court of the United States

F. SCOTT YEAGER,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, when a jury acquits a defendant on multiple counts but fails to reach a verdict on other counts that share a common element, and, after a complete review of the record, the court of appeals determines that the only rational explanation for the acquittals is that an essential element of the hung counts was determined in the defendant's favor, collateral estoppel bars a retrial on the hung counts.

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization with direct national membership of more than 12,500 attorneys and more than 35,000 affiliate members from all 50 States. NACDL is the only national professional bar association that represents public defenders, private criminal defense lawyers, and law professors. Founded in 1958, NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus curiae* briefs in this Court and other courts throughout the country.

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[1] No party or counsel for a party authored any part of this brief, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The doctrine of collateral estoppel is "embodied in the Fifth Amendment guarantee against double jeopardy" and applies fully in criminal cases. *Ashe v. Swenson*, 397 U.S. 436, 445 (1970). The doctrine acts to prevent the government from prosecuting a defendant for a crime that requires proof of a fact that was "actually and necessarily decided in the defendant's favor" by an earlier jury's verdict of acquittal. *Schiro v. Farley*, 510 U.S. 222, 236 (1994). In its decision below, the Fifth Circuit wrongly held that a jury's failure to return a verdict on one count of a multi-count indictment can be "weighed" against the jury's judgment of acquittal on a factually overlapping charge in a way that fatally undermines the collateral-estoppel consequences of that acquittal. Pet. App. 27a. The Fifth Circuit's decision creates a rule that effectively abolishes the collateral-estoppel doctrine in increasingly common multi-count prosecutions that result in partial verdicts.

Collateral estoppel is an essential component of the Double Jeopardy Clause. The doctrine works both to protect judgments of acquittal and to prevent successive prosecutions. The Fifth Circuit's decision is in the teeth of these two core constitutional principles.

First, by "weighing" mistried counts in the collateral-estoppel calculus, the decision will invariably lead to the unconstitutional disregard of juries' judgments of acquittal, thus destroying the "special weight" that acquittals have historically been given in the double-jeopardy analysis. That is because "weighing" a jury's failure to reach a decision on a factually overlapping charge—a failure that means absolutely nothing for

double-jeopardy purposes—will by definition create uncertainty that will prevent a defendant from carrying his burden of proving that an issue of ultimate fact was *actually and necessarily* decided in his favor by his earlier acquittal. The Fifth Circuit's decision perfectly illustrates the problem. In rejecting Yeager's assertion that collateral estoppel barred his retrial, the court unsurprisingly found—*after* "consider[ing] the hung counts along with the acquittals"—"a potential inconsistency, making it impossible for [it] to decide with any certainty what the jury necessarily determined." Pet. App. 22a. In order to come to that conclusion, however, the court had to disregard Yeager's acquittals, which, standing alone, indicated "that Yeager is correct that collateral estoppel bars a retrial." *Id.* The Fifth Circuit's "weighing," therefore, is tantamount to a *per se* no-estoppel rule (a point the Government more or less concedes) that fatally devalues judgments of acquittal.

Second, the Fifth Circuit's decision creates a gaping hole in the Double Jeopardy Clause's protections against successive prosecutions. By allowing a jury's failure to reach a verdict on one count to trump an acquittal in a partial-verdict case, the decision perversely incentivizes the government to charge as many overlapping counts as possible—and to do so precisely so that it can avoid the collateral-estoppel consequences of any acquittal that might result. That is because, under the Fifth Circuit's approach, when a jury acquits a defendant on some counts but hangs on another with a related element, the government is free to retool its case against the defendant on the mistried count in a future prosecution even where the acquittals, when "consider[ed] … by themselves," would estop the prosecution of the mistried count. Pet. App. 21a-22a. By rewarding prosecutors for

overcharging their cases and then failing to prove the superfluous counts, the Fifth Circuit's decision thus turns the Double Jeopardy Clause on its head. Moreover, the practical threat posed by the Fifth Circuit's decision is very real given (1) the exponential growth of criminal codes and (2) the evidence that indicates, unsurprisingly, that juries hang more frequently in cases involving numerous and complicated counts.

ARGUMENT

This case presents a question of vital importance to the criminal justice system: Whether, consistent with the Double Jeopardy Clause, a jury's failure to reach a decision on one count of a multi-count indictment (here, the "hung" or "mistried" count) can be "weighed" against an acquittal on a factually related count in a manner that fatally undermines the acquittal's collateral-estoppel effect for future prosecutions. "Part[ing] ways with [its] sister circuits," the Fifth Circuit held that weighing mistried counts against acquitted counts is constitutionally unproblematic. Pet. App. 27a. That is incorrect. An affirmance here would eviscerate the collateral-estoppel doctrine as it applies to an increasingly large swath of criminal cases, particularly in this age of overlapping federal offenses that provide multiple means of imposing criminal liability for the same underlying conduct. And by rendering the collateral-estoppel doctrine a dead letter in these cases, an affirmance would contradict the fundamental purposes of the Double Jeopardy Clause and its constituent collateral estoppel doctrine—namely, the preservation of acquittals and the prevention of successive prosecutions.

I. *Ashe v. Swenson* Firmly Established Collateral Estoppel As A Rule Of Constitutional Criminal Procedure.

The doctrine of collateral estoppel operates as "an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). This Court in *Ashe* recognized that collateral-estoppel principles are "embodied in the Fifth Amendment guarantee against double jeopardy" and apply with full force in criminal cases. *Id.* at 445.

As a rule of constitutional criminal procedure, collateral estoppel operates to prevent the government from prosecuting a defendant for a crime that requires proof of a fact previously decided in the defendant's favor by an earlier jury's verdict of acquittal. The critical question is whether the particular fact was "actually and necessarily decided" for the defendant as part of the earlier acquittal. *Schiro v. Farley*, 510 U.S. 222, 236 (1994). If it was, then the government is barred—collaterally estopped—by the Double Jeopardy Clause from reprosecuting.

In deciding for "constitutional collateral estoppel" purposes whether a fact was "actually and necessarily decided" in the defendant's favor, *id.*, "a court [must] 'examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from considera-

tion.'" *Ashe*, 397 U.S. at 444 (internal citation omitted). Collateral-estoppel doctrine, therefore, "is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Id.* A court's review, in other words, "'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" *Id.* (internal citation omitted). The point of the pragmatism is clear: "Any test more technically restrictive would … simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal." *Id.*

To be clear, *Ashe* hardly gives criminal defendants a free pass. Under *Ashe*, it is the acquitted defendant—not the government—who bears the burden of proof. In particular, in order to invoke collateral estoppel to prevent successive prosecution on a factually overlapping charge, the defendant must demonstrate that a fact necessary to the government's case was "actually and necessarily decided" in his favor as part of his earlier acquittal. *Schiro*, 510 U.S. at 236; *accord Dowling v. United States*, 493 U.S. 342, 350-51 (1990) (same). Even at that doctrinal level, therefore, *Ashe* erects a high bar, which significantly limits collateral estoppel's real-world operation. *See Dowling*, 493 U.S. at 358 (Brennan, J., dissenting). And in actual practice, *Ashe* will have substantive bite in only a fraction of prosecutions. The reason is that in the overwhelming majority of cases defendants will present alternative theories to the jury. A robbery defendant, for instance, may contend that the prosecution failed to prove either (1) that he intended to permanently deprive the alleged victim of his property or (2) that he used force or intimidation. In that scenario, if the jury acquits in a general verdict, there will be no way to know

which of the defendant's theories prevailed—*i.e.*, what the jury "actually and necessarily decided"—and the *Ashe* rule will be inoperative.

This case, however, is unique. Yeager falls squarely within the narrow-but-essential protection of *Ashe*. Yeager was charged in a 127-count indictment with securities fraud, wire fraud, conspiracy to engage in securities and wire fraud, insider trading, and money laundering. Yeager Br. 3. After a 13-week trial, the jury acquitted Yeager on all securities fraud, wire fraud, and conspiracy counts, hung on the insider-trading and money-laundering counts, and, notably, convicted Yeager of nothing. Yeager Br. 10, 21. After examining the record in accordance with *Ashe*, the Fifth Circuit correctly found that "the jury, acting rationally, could have acquitted Yeager on securities fraud *only* by concluding that he did not have insider information." Pet. App. 18a (emphasis added). And as the court correctly recognized, that apparent determination, on its own terms, should "preclude[] the Government from now prosecuting him on insider trading and money laundering," both of which would require a finding that Yeager actually *did* possess insider information. *Id.* at 21a. Under a straightforward application of controlling precedent, then, the Government's attempt here to institute new insider-trading and money-laundering charges—and thus to attempt to prove (once again) a fact that the first jury "actually and necessarily decided" in Yeager's favor by its verdict of acquittal—should be barred.

Straying from its own premise, the Fifth Circuit reached a contrary conclusion based on logic that, if credited, would eviscerate the collateral-estoppel doctrine—and *Ashe*—in a host of multi-count prosecutions. In par-

ticular, after "consider[ing] the hung counts along with the acquittals," the court found "a potential inconsistency, making it impossible for [it] to decide with any certainty what the jury necessarily determined" in acquitting Yeager. *Id.* at 22a. That uncertainty, the court held, foreclosed Yeager's collateral-estoppel argument. Thus, in performing its *Ashe* analysis, rather than focusing on the jury's actual decisions—the acquittals—the Fifth Circuit instead gave controlling weight to the jury's *failure to reach a decision* on the factually related insider-trading and money-laundering counts. As explained in the next Part, in doing so the Fifth Circuit created what amounts to a partial-verdict loophole in the collateral-estoppel doctrine—a loophole that undermines the very principles that the Double Jeopardy Clause was designed to protect.

II. The Fifth Circuit's Decision Eviscerates The Collateral-Estoppel Doctrine In Multi-Count Prosecutions That Result In Partial Verdicts.

Double-jeopardy protections against multiple prosecutions address two fundamental concerns in our legal system. First, the Double Jeopardy Clause is specifically designed to safeguard final judgments—and, in particular, verdicts of acquittal. *See, e.g.*, *United States v. Scott*, 437 U.S. 82, 92 (1978) ("[T]he primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judgment."). Second, and relatedly, the Clause ensures that an acquitted defendant is not subjected to a do-over in which the prosecutor hopes to refine his case or strike a more favorable jury. *See, e.g.*, *Tibbs v. Florida*, 457 U.S. 31, 41 (1982) ("'[T]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence

which it failed to muster in the first proceeding.'" (quoting *Burks v. United States*, 437 U.S. 1, 11 (1978)). Collateral estoppel, as applied by this Court in *Ashe*, addresses the very same two concerns. *See Crist v. Bretz*, 437 U.S. 28, 33 (1978) ("A primary purpose" served by the Double Jeopardy Clause is "akin to that served by the doctrines of res judicata and collateral estoppel—to preserve the finality of judgments."); *Ashe*, 397 U.S. at 446 (Collateral estoppel "protects a man who has been acquitted from having to 'run the gantlet' a second time.") (internal citation omitted).

The Fifth Circuit's decision below ignores—and worse, actually undermines—both of these double-jeopardy principles. First, by "weighing" mistried counts in the collateral-estoppel analysis, the decision eliminates the special significance that has traditionally been accorded acquittals. And second, by allowing a mistried count to trump an acquittal in a partial-verdict scenario, the decision incentivizes prosecutors to overcharge criminal defendants as an insurance policy in the event that the jury acquits on some counts but hangs on others.

A. The Fifth Circuit's Decision Undermines The Integrity Of Final Judgments And The Special Significance Given To Acquittals.

This Court's double-jeopardy decisions make one point absolutely clear: An acquittal is a constitutionally significant event that is "accorded special weight" in the Fifth Amendment analysis. *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980); *Tibbs*, 457 U.S. at 41 (same); *accord Poland v. Arizona*, 476 U.S. 147, 156 (1986) ("'[T]he law attaches particular significance to an acquit-

tal.'" (quoting *Scott*, 437 U.S. at 91 (1978)). "The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal, for the public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though the acquittal was based upon an egregiously erroneous foundation." *DiFrancesco*, 449 U.S. at 129 (internal quotations and citations omitted). Put slightly differently, "[i]f the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair." *Arizona v. Washington*, 434 U.S. 497, 503 (1978).

The Fifth Circuit's decision ignores altogether—and, indeed, flips on its head—the "special weight" given to acquittals. In its *Ashe* analysis, the Fifth Circuit concluded that it was bound to "weigh mistried counts" in assessing the collateral-estoppel effect of an acquittal. Pet. App. 27a. It did so even though it is well established that a mistried count means *precisely nothing* for double-jeopardy purposes. Unlike an acquittal, which says something specific and concrete—namely, that the jury has unanimously concluded that the defendant is not guilty of the charged offense—a mistrial is a constitutional non-event. *See Richardson v. United States*, 468 U.S. 317, 325 (1984) (noting that "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy" and that "the failure of the jury to reach a verdict is not an event which terminates jeopardy").

The Fifth Circuit's analysis wrongly "presumes that a mistried count, like an acquitted count, is a decision for which we can discern, or to which we can impute, a single

basis." *United States v. Ohayon*, 483 F.3d 1281, 1289 (11th Cir. 2007) (Pryor, J.). It is not. "[T]he failure of a jury to reach a verdict is not a decision; it is a failure to reach a decision." *Id.* Partial verdicts cannot be reconciled for the simple reason that "the mistried count is not a decision for which we can discern, or to which we can impute, a single, rational basis. The very essence of a mistried count is that the jury failed to reach agreement." *Id.*; *see also United States v. Romeo*, 114 F.3d 141, 144 (9th Cir. 1997) ("Because there are so many variable factors which can cause a jury not to reach a verdict, we will not speculate on why the jury could not agree. The inquiry under *Ashe* is what the jury actually decided when it reached its verdict, not … why the jury could not agree on the deadlocked count.").

The upshot is that as between an acquittal and an inkblot (*i.e.*, the mistried count), the Fifth Circuit privileged the inkblot. That makes no sense. Because a mistried count is a double-jeopardy non-event, it cannot be "weighed" or otherwise used to devalue, let alone trump, a jury's conclusive judgment of acquittal. The Fifth Circuit's contrary conclusion cannot be reconciled with the acknowledged purpose of the Double Jeopardy Clause—and its component collateral-estoppel doctrine—to safeguard acquittals.

The perversity of the Fifth Circuit's approach is magnified once it is realized that the seemingly benign practice of "weighing" mistried counts against an acquittal to determine the acquittal's collateral-estoppel effect will, in actuality, result in a *per se* no-estoppel rule for partial verdicts. Indeed, while purporting to reserve judgment, the Government all but concedes that "the analysis adopted by the court of appeals will in practice

produce the same result as a categorical rule that collateral estoppel never applies in mixed verdict cases." Br. in Opp. 14 n.4. This *per se* no-estoppel rule results from the stringent showing that an acquitted defendant must make in order to avail himself of the collateral-estoppel doctrine—namely, that an issue of ultimate fact was *actually and necessarily decided* in his favor in the course of the earlier acquittal. If a mistried count on a charge with a factually overlapping element can be considered, or "weighed," in the collateral-estoppel calculus, then it will, by definition, create uncertainty regarding the jury's verdict of acquittal, thereby preventing the acquitted defendant from establishing what the jury necessarily decided when it acquitted him. Accordingly, *every* time a hung count is "weighed" in determining the collateral-estoppel consequences of a defendant's acquittal of a crime that shares one or more factually related elements, the hung count will act to preclude the defendant from getting the benefit of his acquittal.

That problem is exacerbated because a defendant has no practical way of peeking behind the jury's verdict to determine precisely why the jury acquitted him on one count while failing to reach a decision on another factually related count. The jury might have hung out of leniency, confusion, or even "exhaustion." *See* Yeager Br. 28. It will never be possible to know with any degree of certainty. *See Ohayon*, 483 F.3d at 1289 (recognizing that "the search for the basis of a mistried count will necessarily be in vain"). And even if a defendant could find out what caused the jury to hang, he couldn't make use of that information because litigants typically cannot introduce evidence concerning a jury's deliberations in order to discern what the verdict may or may not mean. *See* Fed. R. Evid. 606(b). Indeed, "[c]ourts have always

resisted inquiring into a jury's thought processes" on the ground that "this deference to the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality." *United States v. Powell*, 469 U.S. 57, 67 (1984). Without the practical ability to discover and use evidence necessary to understand definitively a jury's decision to acquit on one charge and to hang on another, a defendant's already-difficult burden under *Ashe* becomes insurmountable.

The Fifth Circuit's decision perfectly illustrates the point that "weighing" mistried counts will invariably lead to the unconstitutional disregard of a defendant's acquittal. In rejecting Yeager's collateral-estoppel argument, the court acknowledged that when "consider[ed] … by themselves," Yeager's acquittals should "bar[] a retrial." Pet. App. 21a-22a. After "consider[ing] the hung counts along with the acquittals," however, the court unsurprisingly—indeed, inescapably—found "a potential inconsistency, making it impossible for [it] to decide with any certainty what the jury necessarily determined." *Id.* at 22a. Thus, the court said, collateral estoppel did not apply.

The decision below is squarely at odds with the Double Jeopardy Clause's core purpose of protecting acquittals. This Court should reverse the Fifth Circuit's decision, which cannot be reconciled with the constitutional principles espoused in *Ashe*, and make clear that mistried counts—double jeopardy non-events—cannot be used to undermine conclusive judgments of acquittal and their "special weight" under the Double Jeopardy Clause. *DiFrancesco*, 449 U.S. at 129; *Tibbs*, 457 U.S. at

41 (same); *accord Poland*, 476 U.S. at 156 ("'particular significance'" (quoting *Scott*, 437 U.S. at 91)).

B. The Fifth Circuit's Decision Will Encourage Overcharging And Facilitate Successive Prosecutions.

The Fifth Circuit's decision simultaneously undermines the Double Jeopardy Clause's second core function—the protection against successive prosecutions. The decision all but ensures that criminal defendants will increasingly face compound, multi-count indictments and (what is worse) exposes them to the very real possibility of successive prosecutions for factually related crimes arising out of the same underlying conduct. By creating a rule in which a hung count can trump a factually related acquitted count, the Fifth Circuit's decision perversely incentivizes prosecutors to charge as many overlapping counts as possible, thereby paving the way for a retrial. The reason is simple: Overcharging gives the government the best chance of evading the collateral-estoppel consequences of—in effect, insuring against—an acquittal. Where, as here, a jury acquits a defendant on one count but for some unknown (and unknowable) reason hangs on a count with a related element, the government is free, under the Fifth Circuit's rationale, to wipe the slate clean, retry the mistried count, and, for that matter, bring any other charge that otherwise would have been barred by *Ashe*. There is, from the prosecutor's perspective, absolutely nothing to lose by larding an indictment with overlapping charges and absolutely everything to gain.

This case is the perfect example. The Fifth Circuit correctly found that the jury "could have acquitted Yea-

ger on securities fraud only by concluding that he did *not* have insider information." Pet. App. 18a (emphasis added). The court of appeals further recognized that the jury's finding to that effect would appear to "preclude[] the Government from now prosecuting him on insider trading and money laundering"—both of which would require the Government to prove that, in fact, Yeager *did* have insider information. *Id.* at 21a. Thus, "consider[ing] the acquittals by themselves" leads inexorably to the conclusion that the jury unanimously found that the Government had failed to prove that Yeager possessed the very insider information that forms the basis of the insider-trading and money-laundering counts at issue in this successive prosecution. *Id.* at 21a-22a.

It is therefore common ground that if Yeager had been charged in his first trial with securities fraud *only*, the Double Jeopardy Clause (by way of collateral estoppel) would preclude the Government from now trying Yeager for insider trading and money laundering. *See Powell*, 469 U.S. at 64. But under the Fifth Circuit's rationale, everything changes—and the collateral-estoppel bar vanishes—simply because (1) the Government charged the insider-trading and money-laundering counts alongside securities fraud and (2) for whatever reason, the jury hung on the insider-trading and money-laundering counts. The inequity of that situation is patent, and the incentives it creates are perverse.

The Government does not deny that the Fifth Circuit's rule incentivizes prosecutors to overcharge their cases. *See* Br. in Opp. 16-17. Instead, the Government simply contends that "[t]he Double Jeopardy Clause is … not designed to limit the number of charges that

prosecutors bring." *Id.* at 16. There are two problems with the Government's response.

First, the Government's seeming indifference to overcharging ignores the very real-life significance of the issue for defendants. Without question, "[t]he prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous." Robert H. Jackson, *The Federal Prosecutor*, 31 J. Am. Inst. Crim. L. & Criminology 3, 3 (1940). And no decision a prosecutor makes is more significant than the decision whether—and how—to charge a defendant. Conviction or not, the "mere filing of a criminal charge can have a devastating effect upon an individual's life, including potential pretrial incarceration, loss of employment, embarrassment and loss of reputation, the financial cost of a criminal defense, and the emotional stress and anxiety incident to awaiting a final disposition of the charges." Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. Rev. 669, 672 (footnotes omitted).

When charging, prosecutors certainly (even if unintentionally) can cross the line between valid law enforcement and improper overreaching. "Charging decisions do not occur in a vacuum." *United States v. Thomas*, 961 F.2d 1110, 1123 (3d Cir. 1992). While "[g]overnment attorneys have extraordinary discretion in their charging decisions, … they must exercise this discretion with one eye on promoting justice and one eye on winning their cases as efficiently as possible." *Id.* Indeed, the Government's own prosecutorial guidelines warn against the danger of overcharging: "It is important to the fair and efficient administration of justice in the Federal system that the government bring as few

charges as are necessary to ensure that justice is done." United States Department of Justice, *United States Attorneys' Manual* § 9-27.320(B) (2007). Significantly, the manual goes on to emphasize that "[t]he bringing of unnecessary charges not only complicates and prolongs trials, it constitutes an excessive—and potentially unfair—exercise of power." *Id.* By the Government's own admission, therefore, the fact that the Fifth Circuit's decision incentivizes overcharging is reason enough to worry that it undermines "the fair … administration of justice." *Id.*[2]

Second, and more importantly, the issue is not, as the Government frames it, whether the Double Jeopardy Clause has anything to say regarding overcharging *per se*. Instead, the question is whether the Clause is implicated when the overcharging results in prosecutors having multiple opportunities to convict defendants. *See* Paula L. Hannaford-Agor, et al., *Are Hung Juries A Problem?*, The National Center for State Courts 84 (Sept. 30, 2002), *available at* http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesProblemPub.pdf ("Prosecutors in criminal cases have the discretion to charge multiple defendants in one case and to decide how many counts the defendant will face. Our results indicate that these decisions by prosecutors affect whether a jury will hang."). The answer to that question is emphatically yes.

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[2] Here, the Government charged and tried 176 separate counts against five defendants. Yeager alone faced 127 counts. Significantly, the jury did not convict Yeager or his co-defendants of *any* of the 176 total counts that were tried. Instead, the jury acquitted on some counts and ultimately hung on a total of 140 other counts. *See* Yeager Br. 10.

There is no doubt that the Double Jeopardy Clause is designed to guard against successive prosecutions. *See Schiro*, 510 U.S. at 230. The Clause's history demonstrates that concerns about successive prosecutions, in turn, arose from the twin beliefs that final factual determinations should be respected and that prosecutors should not get multiple opportunities to convict. *See* Anne B. Poulin, *The Limits of Double Jeopardy: A Course Into The Dark?* 39 Vill. L. Rev. 627, 639 (1994) ("The original purpose of double jeopardy protection and its predecessors was to preserve the finality of judgments."); *id.* at 633-34 ("Double jeopardy protects the defendant's interest in freedom from multiple trials and multiple punishments ….").

The Government acknowledges this essential protection but asserts that Yeager's retrial on mistried counts is not a "successive" prosecution that implicates the Clause. *See* Br. in Opp. 16-17. That assertion should be rejected. Again, the Government's view seems valid only when viewed through a single lens. The argument unravels once both eyes are opened and Yeager's acquittals on factually overlapping charges come into full view. At the risk of repetition, those acquittals, when "consider[ed] … by themselves," demonstrate that collateral estoppel bars Yeager's retrial. Pet. App. 21a-22a. The Government's insistence that Yeager's retrial is nonetheless not "successive" simply underscores the point that the Fifth Circuit's rule renders Yeager's acquittals meaningless, thereby opening the door for the prosecution to get a second shot at proving precisely what it failed to prove the first time around. In other words, on the Fifth Circuit's view, the prosecution now gets to do what *Ashe* expressly prohibits.

Jettisoning collateral estoppel in partial-verdict cases, as the Fifth Circuit has done, therefore creates a gaping hole in the fundamental constitutional protections against successive prosecutions. *See Schiro*, 510 U.S. at 230. Because the Fifth Circuit's rule allows "a second jury to reconsider the very issue upon which the defendant has prevailed," it "implicates concerns about the injustice of exposing a defendant to repeated risks of conviction for the same conduct, and to the ordeal of multiple trials, that lie at the heart of the double jeopardy clause." *United States v. Mespoulede*, 597 F.2d 329, 337 (2d Cir. 1979). Casting aside this core protective function of the Clause, the Fifth Circuit has created a system with little to "prevent[] the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction." *Tibbs*, 457 U.S. at 41. This greatly increases the risk of "[r]epeated prosecutorial sallies [that] unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance." *Id.*[3]

The practical threat posed by the Fifth Circuit's decision is very real. Legislatures are creating new—and often complex—criminal offenses every day. The federal criminal law, in particular, continues to experience ex-

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[3] There can be little doubt that the Government sought to "hon[e] its trial strategies" and "perfect[] its evidence" here when, in the wake of the jury's partial verdict, it re-indicted Yeager on some of the same insider-trading and money-laundering charges he had faced at trial. *Tibbs*, 457 U.S. at 41. As Yeager's brief explains, in the Eighth Superseding Indictment, the Government "did not simply delete the acquitted counts of the Fifth Superseding Indictment and rely on the hung counts"; rather, the Government "reworked and refined its theory of the case" in what was an "obvious response to the acquittals of Yeager on the fraud counts." Yeager Br. 11.

plosive growth. *See* John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation Legal Memorandum 26 (June 16, 2008), *available at* http://www.heritage.org/research/legalissues/lm26.cfm (cataloguing approximately 4,450 federal crimes and noting that Congress continues to adopt new crimes at a rate of about 57 per year); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 Am. U. L. Rev. 747, 755 (2004) ("[B]etween 1980 and 2003 the number of cases and defendants in the federal system … more than doubled, with the number of criminal cases increasing 240% and the number of criminal defendants increasing 230%."). This continuing proliferation of criminal statutes permits prosecutors to "spin out a startlingly numerous series of offenses from a single alleged criminal transaction." *Ashe*, 397 U.S. at 446 n.10; *accord, e.g.*, *United States v. Bailin*, 977 F.2d 270, 277 (7th Cir. 1992). Unsurprisingly—and this is the kicker—juries hang more frequently in cases involving numerous and complicated counts. *See* Paula L. Hannaford-Agor, et al., *supra*, at 42, 45 (concluding that "[l]ooking at the cases that hang *on any charge*, the greater the number of charges, the more likely that one will be a hung jury outcome," and that "[j]uries in cases that hang on at least one charge rate the case as more complex and difficult for the jury to understand than verdict juries").

Prosecutors therefore clearly have the *opportunity* to skirt double-jeopardy protections by filing bloated multi-count indictments. And the Fifth Circuit's stingy view of collateral estoppel gives prosecutors the *incentive* to do just that. It leads to precisely the sort of agglomeration of prosecutorial power that prompted this Court in *Ashe* to reiterate the centrality of collateral es-

toppel to double-jeopardy doctrine. *See Ashe*, 397 U.S. at 446 n.10.

The Fifth Circuit's decision in this case discards core protections for acquitted defendants in exchange for a system that rewards prosecutors for overcharging their cases and then failing to prove the superfluous charges. This Court should step in to ensure that double-jeopardy principles are not so easily evaded.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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